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DEPARTMENT PLS PASS TO USDA FAS WASHDC AND
USDA APHIS WASHDC

E.O. 12958: DECL: 08/28/2018
TAGS: [PREL](#) [MARR](#) [NATO](#) [AMGT](#) [APER](#) [GM](#) [XA](#)
SUBJECT: NATO SOFA STATUS FOR NON-DOD USG CIVILIANS AT U.S.
MILITARY COMMANDS IN GERMANY: DUAL APPOINTMENTS OFFER
EXPEDITIOUS SOLUTION

REF: A. BERLIN 1102
[1](#)B. BERLIN 1033
[1](#)C. BERLIN 90
[1](#)D. 07 STATE 167990

Classified By: DCM JOHN KOENIG. REASONS: 1.4 (B) AND (D).

[1](#)1. (U) This is an action request. See para 10.

[1](#)2. (C) SUMMARY: In its most recent correspondence with the Embassy, the German Foreign Office retreats from some of its previous unhelpful positions, but continues to contend that only DOD USG civilian employees or dual-appointed non-DOD USG civilian employees can be considered "in the employ of an armed service" and therefore eligible for NATO SOFA status. While our back-and-forth discussion with the Germans has focused on USAFRICOM, the Foreign Office has made it clear that its conclusions about the applicability of the SOFA to non-DOD USG civilian personnel is valid for all U.S. military commands in Germany, including for USEUCOM and its component commands. The Germans are strongly encouraging us to resolve this issue by simply dual-appointing all non-DOD USG civilians. While the Foreign Office indicates a willingness to explore other avenues for covering non-DOD civilians, such as through a supplementary agreement to the SOFA, this would likely be a lengthy process, which could be complicated by a number of domestic factors, including expected parliamentary elections in September 2009. The practical effect of this impasse is to prohibit a small number of USG civilian employees assigned to work at USEUCOM, USAFRICOM and other U.S. military commands in Germany from receiving SOFA status.

Unless we reach a resolution in the next two months, the continued assignments of at least two of these employees are at risk. Even if dual appointments are ultimately judged as not being the ideal long-term solution, we strongly recommend effecting dual appointments for all non-DOD USG civilians in the short term until a permanent agreement can be negotiated with the Germans. END SUMMARY.

Latest Letter from Foreign Office: Some Progress

[1](#)3. (U) Foreign Office Legal Advisor Georg Witschel sent a letter to the Embassy on August 22 (see full text in para 11 below), responding to the Charge's August 6 letter (ref A) on the issue of SOFA status for non-DOD U.S. government employees serving at USAFRICOM. In the letter, Witschel backs away from the intimation in his previous correspondence (ref B) that AFRICOM would be limited to no more than 100 dual-appointed non-DOD civilian employees, underscoring that

Germany is "prepared to react in a flexible manner to accommodate the human resource requirements incumbent in manning AFRICOM." He does not challenge our assertion that the number of DOD employees who can serve in Germany -- including dual-appointed personnel -- is limited only by the Presence Convention. Witschel also fails to reiterate his previous assertion that dual-appointed personnel would not be eligible for SOFA status unless they serve in a "troop support" role.

Dual Appointments: "Simplest and Quickest Solution"

¶4. (U) Witschel, however, states that he does not accept the U.S. view that the wording of Article I of the SOFA ("in the employ of an armed service") is flexible enough to cover any government employee whose services are utilized or engaged by an armed service, provided they accompany the force. He insists that only DOD civilian employees or those non-DOD civilians detailed to DOD through an appointment, may be considered in the employ of an armed service and therefore eligible for SOFA status. He concludes that from the German perspective, the "simplest and quickest solution" regarding the legal status of non-DOD civilian employees at AFRICOM is to dual appoint them to DOD. Nevertheless, he leaves the door open to "a possible arrangement under public international law" and offers further discussions in this regard.

Effect on USEUCOM and its Component Commands

¶5. (C) While the Witschel letter specifically addresses only AFRICOM, the Foreign Office has made it clear to us that its

conclusions about the applicability of the SOFA to non-DOD personnel is valid for all U.S. military commands in Germany, including EUCOM and its component commands. In recent years, the Foreign Office had been willing, through an exchange of diplomatic notes, to extend SOFA status to a small number of non-DOD U.S. civilian personnel working at EUCOM. This is how, for example, SOFA status was extended just last year to the new six-person Joint Interagency Coordination Group (JIACG) (now known as the Command Interagency Engagement Group or CIEG) at EUCOM, which consists of personnel from State, Treasury and Justice. The diplomat in residence at the George C. Marshall Center for Security Studies in Garmisch is also covered in this way, as is the USAID representative and a handful of Department of Veterans Affairs and General Services Administration personnel at EUCOM.

¶6. (C) But in response to our initial request in December to extend this same SOFA treatment to all AFRICOM non-DOD civilians (refs C and D), the Foreign Office, in consultation with the ministries of Justice and Interior, concluded that this approach was no longer viable. We have been told flatly not to expect any further non-DOD civilians at EUCOM to be covered through an exchange of notes. A request, for example, that we submitted to the Foreign Office in February to extend SOFA coverage to a new Department of Agriculture liaison position at EUCOM is unlikely to be acted upon. That said, the Foreign Office has made no moves to invalidate the previous exchanges of notes extending SOFA status to certain non-DOD civilians at EUCOM. Our recommendation is that we proceed on the assumption that these agreements remain fully valid until expressly told otherwise. Since the status was extended by the Foreign Office on the basis of positions, rather than individuals, the SOFA status for these particular positions should remain valid indefinitely.

¶7. (C) It is important to note, however, that there has never been an exchange of notes covering certain long-time non-DOD USG civilian positions at EUCOM, most notably the foreign policy advisor (filled by the State Department). Given that the Germans have now made clear their view regarding non-DOD civilians without dual appointments, this is another issue we will have to address urgently, along with the relatively new non-DOD civilian positions at AFRICOM, EUCOM and other

subordinate U.S. military commands not already covered through an exchange of notes.

Way Ahead

¶8. (C) As the Foreign Office itself suggests, one way to resolve the SOFA status issue for non-DOD civilian employees at AFRICOM or EUCOM not already covered through an exchange of notes is simply to dual appoint all of them to DOD. We defer to Washington agencies on the viability of this way forward, but would point out that German authorities seem relatively relaxed on how dual appointments are carried out and what the detailed provisions might be in each case. There appears to be some flexibility, for example, for DOD to do non-reimbursed dual appointments in certain cases, i.e., where DOD would not reimburse the home agency for the salary and other costs associated with the employee. The U.S. issues its own SOFA credentials for its personnel in Germany; applications are not reviewed by German authorities. The German government has shown no interest in knowing the details of how dual-appointed employee are compensated or performance-rated. The Federal Office seems prepared to acknowledge that non-DOD employees have SOFA status based solely on our certification that they have dual appointments at DOD.

¶9. (C) Another way forward is to seek to negotiate a supplementary agreement with Germany that would cover non-DOD civilian positions whose incumbents lack dual appointments. Although Witschel indicates a willingness to explore this avenue, such a negotiation would be a lengthy process, which could be complicated by a number of domestic factors, including expected German parliamentary elections in September 2009. We cannot count on addressing the immediate problem with currently uncovered non-DOD civilians through a negotiated agreement. By the Embassy's reckoning, there are at least five non-DOD USG civilians currently serving at

AFRICOM, EUCOM or one of their component commands who lack SOFA coverage based on the current German legal position. There may be others:

- the AFRICOM Foreign Policy Advisor,
- the EUCOM Foreign Policy Advisor,
- the SOCEUR Foreign Policy Advisor,
- the EUCOM Department of Agriculture (USDA) liaison officer, and
- the EUCOM Diplomatic Security (DS) liaison officer.

In the case of the USDA and DS liaison officer positions, failure to obtain SOFA status for recently-arrived employees will likely result in the termination of their assignments.

¶10. (C) ACTION REQUEST: Please advise on the Department's preferred way forward in providing SOFA coverage for non-DOD USG civilians working at U.S. military commands in Germany. Even if dual appointments are ultimately judged as not being the ideal long-term solution, we strongly recommend effecting dual appointments for all non-DOD USG civilians in the short term until a permanent agreement can be negotiated with the Germans. END ACTION REQUEST.

¶11. (U) Unofficial Embassy Translation of German Letter (received August 22):

Dr. Georg Witschel
Advisor on International Law
Head of the Legal Division
Ministry of Foreign Affairs
11013 Berlin

To the
Minister of the Embassy of the United States of America
Mr. John Koenig
Pariser Platz 2
10117 Berlin

Berlin, August 15, 2008

Reference: Regional Command of the U.S. Forces for Africa
(AFRICOM)
File No.: 503-554.60 USAFRICOM (Please reference in reply)

Dear Minister, Dear Mr. Koenig,

Thank you very much for your letter of 6 August 2008.

The Federal Government welcomes and supports emphatically that the United States of America has continued to station armed forces in Germany. In particular, it welcomes the establishment in Stuttgart of the U.S. Regional Command for Africa, which pursues an innovative approach, based on the concept of "vernetzte Sicherheit" ("networked security") that combines military and civilian resources to resolve conflict and promote stabilization.

At the same time, I ask you to understand that the Federal Government is bound by existing multilateral provisions of the NATO Status of Forces Agreement as well as domestic German law with regard to the issue of legal status for civilian employees working at AFRICOM.

The Federal Government shares the position of your government that civilian employees of other departments, who through the dual appointment process are detailed to the U.S. Department of Defense, comprise part of the civilian component of the U.S. Forces. To the extent that a numerical limitation was applied to them in the past, this was primarily the result of Diplomatic Note Number 2266 of the US Embassy, dated 25 January 2008, that informed the Federal Government of the limited personnel requirements of AFRICOM. Nevertheless, the Federal Government is prepared to react in a flexible manner to accommodate the human resource requirements incumbent in manning AFRICOM.

As was already discussed during your meeting with State Secretary Dr. Ammon, the legal status of civilian employees at AFRICOM is governed fundamentally by the NATO Status of

Forces Agreement and the Supplementary Agreement. Neither these agreements nor applicable German legislation provide a legal basis for civilian employees, who lack even a dual appointment detailing them to the U.S. Department of Defense, to comprise part of the civilian component of the U.S. Forces.

Furthermore, the Federal Government is of the opinion that civilian component means the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located (Art. I sub-para b, NATO SOFA). Whether this test is met depends on the facts in each individual case. Mere "assignment" to a military organization will normally be insufficient evidence to establish that this test has been met. I do not share your interpretation that even civilian employees, who are not detailed to the Department of Defense by way of appointment, may be considered "in the employ of an armed service."

From our perspective, the simplest and quickest solution regarding the legal status of civilian employees at AFRICOM should be found on the US side by assigning the personnel to the Defense Department. However, I would like to emphasize that we continue to be receptive to a possible arrangement under public international law and we offer you further discussions in this regard.

The Federal Government wishes your government continued success in the establishment of AFRICOM and will support you as much as we can.

Yours sincerely,

Georg Witschel
TIMKEN JR